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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Respondent,

— against —

HUGO Z. SEGAL,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. DID THE ADMITTING INTO EVIDENCE OF A TAPED CONVERSATION MADE BY A CONFIDENTIAL INFORMANT, WITHOUT A SHOWING AS TO HIS UNAVAILABILITY TO TESTIFY, DENY TO APPELLANT HIS CONSTITUTIONAL RIGHT TO CONFRONTATION?

2. DID THE GOVERNMENT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS, BY FAILING TO REVEAL THE TRUE IDENTITY OF THE CONFIDENTIAL INFORMANT?

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OPINION BELOW

The appellant was convicted, following a jury trial, before the Hon. Whitman Knapp of the United States District Court for the Southern District of New York.

The Second Circuit Court of Appeals affirmed the judgment of conviction in a written, unreported opinion, dated March 5, 1984. (See Appendix A)

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on March 5, 1984. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Second Circuit Court of Appeals affirmed the conviction against appellant which was rendered following a jury trial in the District Court for the Southern District of New York.

The trial commenced on July 19, 1983 and concluded on July 27, 1983, when the jury found the appellant, Hugo Z. Segal, guilty on every count, except count three, in a nine count indictment.* The indictment charged appellant with possessing an unregistered machine gun, transferring an unregistered machine gun, and failing to make and maintain the required records in connection with the sale of seven handguns.

The following facts were established at trial:

*Prior to trial count four (4) of the indictment was dismissed.

That the appellant, Hugo Z. Segal, was authorized and licensed by the Federal Government to deal in firearms.

In 1979, Robert Vivona, a theatrical special effects consultant, started to shop at "The Trader", an army-navy store owned by the appellant. Between 1979 and 1981 Vivona periodically purchased surplus goods and articles of clothing from appellant. During these frequent visits, Vivona upon seeing a display case in the store, learned that both he and appellant shared an interest in replica weapons. Vivona also learned that like himself, appellant possessed a Federal Firearms Dealer's license.

Vivona testified that appellant told him he owned a real Schmeisser machine gun and that the weapon would not properly function because of a bolt that was missing. On a subsequent visit to

appellant's store, Vivona testified that he actually saw the machine gun and that it was operable. On May 6, 1982, Vivona inquired if the weapon was for sale and when he heard it was, he paid \$700.00 for it. Vivona then testified that over the next three months, appellant also sold him five handguns allegedly in violation of Federal Law.

On July 24, 1982, Vivona was arrested by the New York City Police Department for the illegal possession of weapons in his home. After his arrest Vivona met with Special Agent Frank Napoli of the Bureau of Alcohol, Tobacco and Firearms ("ATF") and agreed to cooperate with Federal Authorities by identifying his source for the weapons. In return for his cooperation, Vivona eventually received reduced charges in the State case pending against him.

On July 29, 1982, Vivona called

appellant, recorded the conversation, and inquired as to the availability of additional handguns. Later than day Vivona, wearing a hidden transmitter, purchased two additional handguns from appellant. On August 16, 1982, wearing a hidden recording device, returned to appellant's store and again purchased several weapons. During both transactions appellant did not request any identification from Vivona or record the purchases made.

On October 28, 1982, Special Agent Margaret Moore ("ATF") and a confidential informant, "Suckow", went to appellant's store. "Suckow" wore a hidden tape recording device and the two of them engaged appellant in a conversation. Agent Moore, told appellant she needed a gun and arranged to meet with him the following day to pick up the weapon. On October 29, 1982, Agent Moore and

"Suckow" returned to the store. Again "Suckow" wore a hidden tape recording device and Agent Moore then purchased a handgun from appellant.

On January 26, 1983, Agent Napoli and another agent went to appellant's store and demanded to see his firearms and record books. Appellant showed them his license but advised them he had no such record books because he only sold replica weapons not real firearms.

The appellant testifying in his own behalf, admitted he sold replica weapons to Agent Moore and Vivona but denied selling any real weapons. Appellant explained that he often purchased job lots or bulk packages of replica weapons and that it was possible that these lots might sometimes contain real weapons by mistake. Appellant also testified that it was Vivona who had shown the machine gun to him and told him

that he had paid \$700.00 for it.

The appellant called six (6) factual witnesses. Three of them, Innocencios Rios, Mike Perkell, and Warner Huber testified that they often visited appellant's store and had never seen anything but replica weapons in the store. Rios and Perkell stated that they had seen Vivona in the store holding and purchasing replica weapons from appellant.

Gary Cohen testified that he had seen Vivona in the store carrying a machine gun in a long bag and offering to sell it to appellant for less than \$1,000.00. Cohen then stated that appellant had refused to buy the gun from Vivona.

Carlos Romero who had worked at appellant's store testified that he saw the appellant sell agent Moore a replica weapon after Agent Moore said she needed a gun for protection.

The appellant also produced three character witnesses who testified to his excellent reputation.

Appellant was sentenced on Count Five to three months' imprisonment to be served on weekends, to be followed by a four (4) years, nine month term of probation. The Court suspended imposition of sentence on the remaining counts and placed appellant on probation for a period of five (5) years on each count, to run concurrently with the sentence imposed on Count Five.

Appellant is free on bail pending the outcome of this petition.

REASONS FOR GRANTING THE WRITPOINT I

APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION, BY THE ADMISSION INTO EVIDENCE OF THE TAPED CONVERSATIONS MADE BY THE CONFIDENTIAL INFORMANT, WITHOUT A SHOWING AS TO HIS UNAVAILABILITY TO TESTIFY.

The rights of a defendant under the Sixth Amendment include the right..."to be confronted with the witnesses against him." This right to confrontation has been held to be fundamental. Pointer v. Texas, 380 U.S. 400 (1965). Inherent in this is the belief that the use of cross-examination is crucial to a defendant's ability to obtain a fair trial. See: Douglas v. Alabama, 380 U.S. 415 (1965); Alford v. United States, 282 U.S. 687 (1931). Nor would it be frivolous to argue that the defendant's constitutional rights include a Governmental obligation to produce each and every witness whose declarations it seeks

to use. California v. Green, 399 U.S. (1970) J. Harlan, concurring opinion, In the case at bar the Government used the testimony of Agent Moore to introduce a secretly recorded conversation between Agent Moore, the appellant and a confidential informant called "Suckow". The unexplained refusal of the Government to produce "Suckow", who recorded the conversation, violated appellant's right to confront and cross-examine "Suckow".

In Ohio v. Roberts, 448 U.S. 56 (1980) this Court established a two part standard which had to be met before the prior statements of an unavailable witness could be introduced. First, the Government is required to show that a good faith effort has been made to produce the non-appearing witness. Once this is established, it must then be shown that the statement sought to be introduced bears sufficient "indicia of

reliability" that the otherwise hearsay statement is worthy of trust. Ohio v. Roberts, supra at 65. At appellant's trial the government violated this standard by failing to produce "Suckow" or explain why he was not called as a witness.

In Barber v. Page, 390 U.S. 719 (1968) this Court reversed a defendants conviction when the state failed to explain what good faith efforts had been made to produce a witness whose prior testimony had been introduced at trial. Appellant readily concedes that no single good faith test can be used for all cases but here the Government failed to use any. There was no showing that the Government's efforts to subpoena "Suckow" had failed. Cf. Ohio v. Roberts, supra, (where attempts to subpoena the witness had failed). Nor was there a showing that the witness was outside the

jurisdictional reach of the Government's process. Cf. Mancusi v. Stubbs, 408 U.S. 204 (1972), (where the missing witness had become a permanent resident of a foreign country). In short, no showing was made at all as to why "Suckow" was not produced at trial to testify concerning the tape recorded conversation he made which was admitted into evidence.

It is clear that appellant was prejudiced by the Government's failure to explain the absence of "Suckow". Both the court and the jury were left guessing as to why "Suckow" did not appear. It is quite possible that the jury wrongly believed that "Suckow's" absence was due in some way to appellant's actions. In addition, appellant firmly believes that the testimony of "Suckow" would have been both "relevant and material to his defense". United States v. Ricardo Valenzuela-Bernal, 458 U.S. 858

(1982). This being so the Government was obligated to advise the Court as to the whereabouts of "Suckow" so that appellant's constitutional right to compulsory process under the Sixth Amendment could be protected. See: Washington v. Texas, 388 U.S. 14 (1967).

Appellant recognizes that the Government may not be called upon to demonstrate the unavailability of a witness in every conceivable circumstance. Ohio v. Roberts, supra at 65, footnote 7, citing Dutton v. Evans, 400 U.S. 74 (1970). However, this is not an example of a situation where such a confrontation would be useless or of little value. The tape recorded conversation involved a critical aspect of the Government's case against the appellant. Without the ability to cross-examine "Suckow" appellant had no opportunity to determine "Suckow's" role in the Government's case

and whether previous unrecorded conversations had taken place. In short, appellant was unable to attack the credibility of a confidential informant whose tape recorded conversations with appellant and Agent Moore were introduced at trial.

POINT II

BY FAILING TO REVEAL THE
TRUE IDENTITY OF THE
CONFIDENTIAL INFORMANT
THE GOVERNMENT VIOLATED
APPELLANT'S CONSTITUTIONAL
RIGHT TO DUE PROCESS.

In Roviaro v. United States, 353
U.S. 53 (1957), this Court established
that the right to due process may require
the Government to reveal to a defendant
the true identity of its confidential
informant. Here, the failure of the
Government to reveal to appellant the
true identity of "Suckow", a confidential
informant who in essence was allowed to
testify without being called as a witness
clearly violated appellant's rights under
the due process clause.

The role played by "Suckow" in the
investigation of appellant was a critical
part of the Government's case at trial.
He secretly recorded a conversation be-
tween himself, appellant and Agent Moore
during which Agent Moore purchased a

weapon from appellant. At trial Agent Moore was called as a Government witness and "Suckow's" tape recording was introduced through her testimony. At no time did the Government reveal the true identity of "Suckow" or explain why they could not.

In Roviaro, supra at page 62, this Court recognized the difficult issues presented and stated:

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defense, the possible significance of the informers testimony, and other relevant factors."

In an examination of appellant's case based upon the above factors, it becomes obvious that they point in favor of disclosure.

As in Roviaro, supra, appellant was charged with an illegal sale. Since "Suckow" was apparently the crucial link between appellant and Agent Moore his involvement was not a minor one. "Suckow" probably initiated the contact which led to the ultimate transaction between appellant and Agent Moore.

In addition, because "Suckow" did not testify appellant was unable to question him as to any prior conversations between himself and appellant. This would have enabled appellant to firmly establish his defense of not "knowingly" selling an operable firearm to Agent Moore. Finally, the Government made no attempt to explain why "Suckow's" identity could not be revealed to appellant. Such a failure should be viewed as a "relevant factor". United States v. Silva, 580 F. 2d 144 (5th Cir. 1978). As is readily apparent, the

revealing of "Suckow's" true identity would have been relevant and helpful to appellant's defense at trial. See: United States v. Raddatz, 447 U.S. 682 (1980).

It has been held that the Roviaro test can be applied to three different types of cases. See: Suarez v. United States, 582 F. 2d. 1007 (5th Cir. 1978); United States v. Jiles, 658 F. 2d 194 (3rd Cir. 1981). In the first type, the informant plays a critical part in the actions which led to the defendant's charges. In such a case production of the informant's identity is almost always required. See, e.g., United States v. Silva, supra. Herein, appellant was confronted with the same situation. In the other two types of cases, the informant plays a minor role or was a witness to the events.

In these cases the Roviaro balancing test will be more difficult to apply and as a result may not be easily predicted. However, appellant's case falls within the first type and requires disclosure.

In the Government's brief to the Court of Appeals, it was stressed that "Suckow" was known to appellant. Even if true, this should not be a reason for allowing the Government to assert its limited privilege concerning "Suckow's" true identity. As was stated in Roviaro, supra at 60...."Once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable."

Under the factual circumstances of this case it is clear that the identity of "Suckow" was vital to appellant's defense. The failure of the Government to reveal his true identity, or at least

show why it could not, deprived
appellant of his constitutional right
to due process.

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE GRANTED AND THE
JUDGMENT BELOW REVERSED.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of March, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
HONORABLE RALPH K. WINTER,
Circuit Judges.

-----x
UNITED STATES OF AMERICA,

Appellee, Docket No.
-against- 83-1388

HUGO Z. SEGAL,

Defendant-Appellant.

-----x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. Judge Knapp did not abuse his discretion in denying a mistrial because of Agent Napoli's remark on the stand. The comment was made on cross-examination and in relation to a line of questioning initiated by the defense on direct. When the defense has raised but not

resolved an issue on cross-examination, the prosecution may elicit testimony to explain it more fully. U.S. v. Panebianco, 543 F. 2d 447, 455 (2d Cir. 1976) cert. denied, 429 U.S. 1103 (1977); U.S. v. Cirillo, 468 F. 2d 1233, 1240 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973). Nor did the remark identify specific unrelated acts of a criminal nature, as in Gregory v. U.S., 369 F. 2d 185 (D.C. Cir. 1966), after remand, 410 F. 2d 1016, cert. denied, 396 U.S. 865 (1969), on which appellant relies. And, the judge gave a curative instruction limiting the jury's consideration of the testimony, see U.S. v. Cirillo, supra.

2. Segal argues his Sixth Amendment rights were violated by the government's failure to disclose Suckow's status as an informant or to produce him at trial. This is, however, not a case in which

the "informant is, in a real sense, 'unknown' to the defendant," U.S. v. Fuentes, 563 F. 2d 527, 534 (2d Cir.), cert. denied, 434 U.S. 959 (1977). On the contrary, there was sufficient evidence of Segal's awareness of Suckow's identity, and the tapes on which Suckow's voice was heard were furnished to Segal several weeks before trial. The government had no obligation to "produce the informant at trial or to guarantee his availability," Id.

3. We decline appellant's invitation to overturn the well-established rule permitting evidentiary use of recordings of conversation between a government agent and a defendant, U.S. v. White, 401 U.S. 745 (1971); U.S. v. Coven, 662 F.2d, 173 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). The fact that Suckow proceeded with the recording knowing its intended purposes is adequate indication

of the consent required for admission of such evidence. U.S. v. Fuentes, supra, 563 F. 2d at 533.

4. Appellant's other assertions, including that relative to sufficiency of the evidence, are equally without merit.

5. Accordingly, the judgment of the district court convicting Segal of possession and transfer of an unregistered machine gun, and failure to maintain records in connection with the sale of handguns, is affirmed.

IRVING R. KAUFMAN,

JAMES L. OAKES,

RALPH K. WINTER,
Circuit Judges.